Filed 7/30/19 P. v. Rodriguez CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EDUARDO LUIS RODRIGUEZ, Defendant and Appellant.	G055741 (Super. Ct. No. 17NF1556) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kathleen E. Roberts, Judge. Affirmed and remanded with directions.

Correen Ferrentino, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Allison V. Acosta and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Eduardo Luis Rodriguez was charged with making criminal threats. During a trial, the alleged victim gave somewhat contradictory testimony as to the wording of Rodriguez's threatening statements. The jury found Rodriguez guilty of the lesser included offense of attempted criminal threats.

Rodriguez claims there was insufficient evidence to support his conviction based on the victim's "inadequate" testimony. But in a sufficiency of the evidence review, we "'must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment.'" (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) Given that deferential standard of review, we affirm the jury's guilty verdict.

Rodriguez also claims that due to a recent change in the law, we should remand for resentencing. The Attorney General concedes the issue and we agree. On remand, the court may exercise its discretion to dismiss a five-year sentence enhancement for a prior serious felony conviction. In all other respects, the judgment is affirmed.

I

STATEMENT OF FACTS AND THE CASE

On June 3, 2017, Rodriguez entered an Anaheim liquor store sometime during the mid-afternoon. Rodriguez grabbed a can of beer, dropped a $1 bill on the counter, and began to leave. The store owner D. Singh was behind the counter at the cash register. Singh told Rodriguez that he needed to pay the full amount for the beer, which was about $1.50, but Rodriguez said, "No."

Rodriguez then walked behind the counter and began yelling at Singh.[1] Rodriguez backed Singh up against a wall, stood about three inches away from Singh—

[1] Singh's testimony regarding Rodriguez's statements will be described more thoroughly in the discussion section of this opinion.

right in front of his face—and continued to yell at Singh. After a few minutes, Rodriguez left the counter area. Singh then ran out of the liquor store and called the police.

Singh's wife had been in the back office. Through a video monitor, she saw Rodriguez pushing Singh, and she could hear Rodriguez yelling at Singh, but she could not understand what was being said. Singh's wife locked the door to the office and called the police.

Abel C. was entering the liquor store to buy a snack. Abel had a cap on and was distracted when he felt a blow to his chest. Abel looked up, saw Rodriguez, and realized that he had just been punched in the chest. Rodriguez told Abel, "'If you want to call the police, go ahead, I was just released from jail.'" Rodriguez tried to hit Abel again, but he was able to run away from the liquor store.

A police officer arrived and asked Rodriguez what happened. Rodriguez told the officer "nothing happened in the store; there was no altercation."

Court Proceedings

The prosecution filed an information charging Rodriguez with one count of making criminal threats (Singh), two counts of misdemeanor battery (Singh and Abel), and other unrelated counts (Rodriguez pleaded guilty to those counts prior to trial). The information further alleged a strike prior, three prison priors, and a five-year sentence enhancement for a prior serious felony conviction.

During the trial, the prosecution dismissed one of the misdemeanor battery counts (Singh). The jury found Rodriguez guilty of two lesser included offenses: attempted criminal threats (Singh), and misdemeanor assault (Abel). The trial court found true the allegations, but dismissed the strike prior. The court sentenced Rodriguez to five years, eight months in state prison (five years for the enhancement and half of the low term for the attempted crime).

II

DISCUSSION

Rodriguez contends: A) there was insufficient evidence to sustain his attempted criminal threats conviction; and B) we should remand the matter so the trial court can exercise its discretion to dismiss the five-year sentence enhancement.

A. Sufficiency of the Evidence

In a sufficiency of the evidence review, we resolve all conflicts in the evidence in favor of the verdict; we "indulg[e] every reasonable inference the jury could draw from the evidence." (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) Reversal is unwarranted unless "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Evidence is "substantial" where, upon review of the entire record, it is found to be reasonable, credible and of solid value. (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577.) "In making this determination, the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.)

"It is the trier of fact, not the appellate court, that must be convinced of a defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." (*People v. Robillard* (1960) 55 Cal.2d 88, 93.)

1. Criminal Threats and Attempted Criminal Threats

The elements of the criminal threats crime are: (1) willfully threatening to commit a crime that will result in death or great bodily injury to another person; (2) the specific intent that the statement be taken as a threat; (3) the threat was on "its face and under the circumstances . . . *so* unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat"; (4) the threat caused the victim "to be in sustained fear for his or her own safety or for his or her immediate family's safety"; and (5) the victim's fear was reasonable under the circumstances. (Pen. Code, § 422, subd. (a), italics added.)

An attempted crime occurs when a defendant intends to commit the crime and commits a direct, but ineffectual act toward its commission. (Pen. Code, § 664, subd. (e).) A defendant can be found guilty of an attempted criminal threat in several ways. For instance, "if a defendant . . . acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety . . . the defendant properly may be found to have committed the offense of attempted criminal threat." (*People v. Toledo* (2001) 26 Cal.4th 221, 231.)

2. Singh's Testimony

During Singh's direct testimony, Singh described what happened after Rodriguez refused to pay full price for the beer and entered the counter area:

"Q: What if anything did he say to you?

"A: That's when he came in and he wanted to kill me. That's why he came behind the counter.

"Q: When did he tell you he wanted to kill you?

"A: He was just shouting saying all the time since like five, six minutes inside the counter.

"Q: How many times did he tell you he wanted to kill you?

"A: Many times.

"Q: And do you remember the exact words that he used?

"A: That's I'm going to do something to you. [*Sic*.]

"Q: I'm going to do something to you?

"A: Yeah.

"Q: And do you remember where you were specifically behind the counter when he told you he wanted to kill you?

"A: All the way by the wall. He push me all the way to the wall. I can't go any far from the wall. [*Sic*.]

"Q: So you're back was up against the wall?

"A: Yes.

"Q: And where was he when you're back was against the wall? [*Sic.*]

"A: Right front of my face. [*Sic*.]

"Q: So you just motioned with your hands?

"A: Yes.

"Q: Making up-and-down motion about three inches from your body?

"A: Yes.

"Q: Okay. Did he get physical at all with you during this altercation?

"A: Well I told him right away there's a camera recording. . . .

"Q: Okay. Now, where was your wife and children?

"A: In the office.

"Q: I'm sorry.

"Q: My wife she was doing work in the back. When she hear the noise she came to the counter when he was holding me at the counter. Then because my children in the office and then she called the police." (*Sic*.)

The prosecutor played three different video clips from the liquor store's camera surveillance system. There was no audio recording. Singh narrated the video clips as the prosecutor continued asking Singh questions:

"Q: Okay. Now I'm starting the third surveillance clip for you. And who's that person that just stepped into the frame?

"A: Wife.

"Q: Is her name . . . ?

"A: Yes.

"Q: Okay. Now we're about almost three minutes into this video . . . . So in the two to three minutes that he had you pinned against the wall, how many times, if you could estimate, did he tell you I'm going to kill you?

"A: I don't remember.

"Q: You don't remember. More than once?

"A: More than once.

"Q: More than five times?

"A: Maybe three or four times.

"Q: Three or four times?

"A: Yeah.

"Q: And were you in fact in fear for your life?

"A: Yes.

"Q: Were you in fact in fear for your family's life?

"A: Yes."

On cross-examination, defense counsel asked Singh about statements he had made prior to trial to defense counsel's investigator:

"Q: . . . Do you recall my investigator talking to you about going to the back of the store?

"A: Yes.

"Q: Do you recall telling my investigator that Mr. Rodriguez did not say that he was going to kill you back there?

"A: He said, 'Let's go back. I want to see you in the back.'

"Q: Okay. Now, Mr. Singh, language precision is very important here. Okay. I'm asking you the exact words Mr. Rodriguez said?

"A: He did not say, no.

"Q: Sir, got to let me finish. . . . [¶] Mr. Rodriguez's exact words were, 'Let's go in the back. I can kill you back there.' Is that your testimony?

"A: No, he --

"Q: What did he say?

"A: He said, 'Let's go back. I want to see you in the back.'

"Q: And would you agree that that is not the same as, 'Let's go in the back. I can kill you back there,' right?

"A: No, he did not say 'kill' but he say 'behind the counter.' [*Sic*.]

"Q: Okay. Now, you may have thought that, right?

"A: Yes, I do."

Defense counsel later played a recorded interview between Singh and the officer who initially responded to the liquor store:

"Q: You talked [to the officer] about what happened behind the counter, right?

"A: Yes.

"Q: And in that conversation you never mentioned that Mr. Rodriguez said multiple times, 'I can kill you,' did you?

"A: He did say it.

"Q: No, that's not what I asked. I asked is that what you told the officer that Mr. Rodriguez said it multiple times?

"A: I don't know. I don't remember.

"Q: How many times did he say it?

"A: Few times; three, four times. I don't know. At least three, four times.

"Q: What were the exact words he used each time?

"A: I don't know."

3. Analysis and Application

"To constitute a criminal threat, a communication need not be *absolutely* unequivocal, unconditional, immediate, and specific. The statute includes the qualifier 'so' unequivocal, etc., which establishes that the test is whether, in light of the surrounding circumstances, the communication was *sufficiently* unequivocal, unconditional, immediate, and specific . . . ." (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861.) The jury is "free to interpret the words spoken from all of the surrounding circumstances of the case." (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1341.)

That is, a defendant's unclear statements may support a conviction for making criminal threats under the surrounding circumstances. (*People v. Butler* (2000) 85 Cal.App.4th 745, 753-754.) "Even an ambiguous statement may be a basis for a violation of section 422." (*Ibid.*) Further, "a jury can properly consider a later action taken by a defendant in evaluating whether the crime of making a [criminal] threat has been committed." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1014.)

Here, the jury heard the testimony of Singh, Singh's wife, Abel, and the investigating officer. The jury also viewed the video surveillance evidence, as well as

various photographs.[2] Based on this evidence, we find that the jury could have reasonably deduced: (1) Rodriguez willfully threatened to kill Singh, or to cause him great bodily injury; (2) Rodriguez had the specific intent that his words be taken as a threat; (3) Rodriguez's words *were sufficiently specific* to convey to Singh the gravity and immediate prospect that Rodriguez would carry out his threat; (4) Rodriguez's words and accompanying actions caused Singh to be in fear for his safety, as well as for the safety of his family; and (5) Singh's fear was reasonable given the totality of Rodriguez's unprovoked behavior. (See Pen. Code, § 422, subd. (a).)

That is, we find sufficient evidence to sustain a conviction for the completed crime of criminal threats; therefore, we find sufficient evidence to sustain the jury's conviction for the attempted crime. (See *People v. Rundle* (2008) 43 Cal.4th 76, 138, fn. 28 ["a defendant can be convicted of an attempt to commit a crime even though the crime, in fact, was completed. Further, evidence tending to prove that the crime was completed, even though not absolute proof of the crime of attempt, gives rise to a reasonable inference that the perpetrator intended to commit that crime"].)

Rodriguez argues "the record is devoid of evidence of what, if anything, appellant actually said to Singh. Singh admitted appellant did not threaten to kill him. If appellant said anything, the lack of specificity as to what constitutes his statements coupled with his erratic behavior suggests he engaged in nothing more than an emotional outburst." We disagree.

Singh's testimony was not a model of clarity, but he repeatedly replied in the affirmative when the prosecutor asked him on direct examination whether Rodriguez had threatened to "kill" him. Later, during cross-examination, Singh said that Rodriguez

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[2] We directed the trial court to transmit to this court all of the admitted exhibits to aid in our substantial evidence review. (See Cal. Rules of Court, rule 8.224(d) ["At any time the reviewing court may direct the superior court . . . to send it an exhibit"]; see also *People v. Duenas* (2012) 55 Cal.4th 1, 25 [demonstrative evidence is evidence that is shown "as a tool to aid . . . in understanding the substantive evidence"].)

had not used the word "kill." But Singh seemed to be referring only to a precise point in the encounter; specifically, when Rodriguez apparently threatened to take Singh to the back room of the store. In any event, "an ambiguous statement may be a basis for a violation of section 422." (*People v. Butler*, *supra*, 85 Cal.App.4th at pp. 753-754.) More importantly, contradictions in the evidence routinely occur during the course of a trial; we leave such discrepancies in the capable hands of 12 jurors to resolve. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 12-13 [reviewing courts "do not . . . resolve conflicts in the evidence, or reevaluate the credibility of witnesses"].)

Rodriguez also argues the record "fails to establish that appellant specifically intended to threaten Singh." Again, we disagree. Intent is a subjective mental state that is rarely susceptible of direct proof; a defendant's mental state is almost always proven by circumstantial evidence. (*People v. Thomas* (2011) 52 Cal.4th 336, 355.) "Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question." (CALCRIM No. 223.) "Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent . . . ." (CALCRIM No. 223.)

Rodriguez did not testify, so there was no direct evidence of his subjective intent to threaten Singh. However, Singh testified that Rodriguez came behind the counter without provocation, backed Singh up against a wall, and threatened him. The video evidence corroborated Singh's testimony. Further, Rodriguez's later physical assault against Abel (as he was entering the store) provided additional circumstantial evidence of Rodriguez's intent to threaten Singh. (See *People v. Solis*, *supra*, 90 Cal.App.4th at p. 1014 ["a jury can properly consider a later action taken by a defendant in evaluating whether the crime of making a terrorist threat has been committed"].)

Based on the totality of the evidence, a jury could have reasonably inferred Rodriguez's unlawful intent to threaten Singh. In sum, there is no basis on which to reverse Rodriguez's conviction for attempted criminal threats.

B. Remand for Resentencing

When the trial court sentenced Rodriguez, it had no authority to strike his five-year prior serious felony conviction enhancement. (See former Pen. Code, §§ 667, subd. (a), 1385, subds. (b), (c)(2), Stats. 2014, ch. 137, § 1, eff. Jan. 1, 2015.) Effective January 1, 2019, the law now allows trial courts to strike or dismiss so-called "nickel"priors. (Pen. Code, § 1385, subd. (a), Stats. 2018, ch. 1013, § 2.) The law applies retroactively. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Accordingly, we will remand so the court can exercise its sentencing discretion. Of course, we take no position on the merits.

III

DISPOSITION

The matter is remanded for the trial court to consider whether to exercise its discretion to strike the five-year prior serious felony conviction enhancement. In all other respects, the judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.